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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1984

CITY OF PLEASANTON, ET AL.,

Appellants,

VS.

TRAVIS J. SMITH, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a city's submission of a new proposed Home Rule Charter to the Justice Department for preclearance under § 5 of the Voting Rights Act of 1965 constitutes a submission of all the provisions contained in the Charter or rather, as held by the district court, only the provisions discussed specifically by the city in its transmittal letter accompanying the Charter.

2. Whether a three-judge United States Court may review the basis for the Justice Department's decision not to interpose an objection to a voting procedure formally submitted to the Attorney General for preclearance.

3. Whether an objection by the Justice Department to provisions in a Home Rule Charter concerning the method of electing councilmembers implicitly includes an objection to separate provisions in the Charter (contained in a separate section) concerning the recall of city officials.

PARTIES

There are two appellants: Danny Qualls, Mayor of Pleasanton, Texas, and Clem Titzman, Presiding Election Judge of Pleasanton. Both appellants were defendants in the case below. The other defendants were the City of Pleasanton and Elaine Tullos, City Secretary of Pleasanton.

The plaintiffs in the case below were Travis J. Smith, Abraham Saenz, Jr., and Johnny Bosque.

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JURISDICTIONAL STATEMENT

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Appellants Danny Qualls, Mayor of Pleasanton, Texas, and Clem Titzman,

Election Judge of Pleasanton, respectfully pray that this Court summarily reverse the judgment of the United States District Court for the Western District of Texas entered on November 21, 1983, holding that the procedure for recall of city officials contained in the Pleasanton Home Rule Charter was not precleared by the Attorney General under the Voting Rights Act of 1965 and was, therefore, void.

OPINIONS BELOW

The district court opinion dated November 4, 1983 is unreported and is reprinted as Appendix A (hereafter referred to as "App."). The Announcement of Decision entered by the district court on October 7, 1983 is reprinted as Appendix B. The judgment of the district court entered on November 21, 1983, is reprinted as Appendix C.

JURISDICTION

This is a direct appeal from the judgment of a three-judge district court convened pursuant to 28 U.S.C. § 2284 to

hear an action challenging the validity of a municipal recall election on the basis that the recall provision in the City Charter had not been precleared by the Attorney General under the Voting Rights Act of 1965. On November 21, 1983, the three-judge court entered its judgment that the recall provision had not been precleared and, therefore, the recall election held pursuant to its terms was invalid. Appellants filed a notice of appeal in the district court on December 29, 1983. The notice of appeal is reprinted as Appendix D. This Court has jurisdiction of this direct appeal under 28 U.S.C. § 1253.

STATUTES INVOLVED

The principal statute involved in this case is § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1981). The statute is reprinted as Appendix E.

STATEMENT OF THE CASE

This is a direct appeal from a judgment of the three-judge United States District Court for the Western District

of Texas holding that the recall provision contained in the Home Rule Charter of the City of Pleasanton was not "precleared" under § 5 of the Voting Rights Act of 1965 and was void. The crucial issue in this case is whether a city's submission of its entire proposed Home Rule Charter to the Justice Department for preclearance constitutes a submission of all the provisions contained in the Charter or, rather as held by the district court, only the provisions specifically referenced by the City in the transmittal letter.

The City of Pleasanton is a small community located in South Texas.[1] Prior to 1982, it was a general law city governed by the general laws of the State of Texas. On August 9, 1980, a group of citizens residing in the City was elected to draft and present to the voters a home rule charter as authorized by Texas law. On May 17, 1983, after consultation with the Texas Municipal

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[1]Pleasanton has a population of about 6,000.

League (a state advisory body which, inter alia, provides legal advice to small communities which do not have a city attorney) and review of the charters of other Texas cities, the Charter Commission presented a proposed charter and recommended that an election be held on August 14, 1982 for adoption of the Charter by the voters.

During the course of the formulation of the Charter, the City Manager was advised by the Texas Municipal League concerning preclearance procedures for the Charter. Accordingly, the City Manager had numerous telephone conversations with the Department of Justice on the proper manner of preclearing the Charter. In the course of these conversations, the Department specifically advised the Manager on the procedure for submitting the Charter and requested that when the Charter was submitted for preclearance, specific reference be made to the Charter provisions concerning election of the mayor since that provision would be closely scrutinized.

On May 25, 1982, the City Manager formally submitted the entire proposed Charter to the Justice Department for preclearance. In that regard, he forwarded two copies of the proposed Charter as instructed. Further, as directed by the Department, the City's cover letter specifically referenced the Charter provision for election of the mayor.

The Justice Department responded sixty-two days later with a letter dated July 26, 1982, stating, "This is in reference to the August 14, 1982 referendum election for the proposed city charter . . . submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965." In this letter, which was not sent until the referendum election was less than three weeks away, the Department asserted that it had insufficient information to evaluate the submission and requested additional information. Among other inquiries for additional information, the letter posed the following: "Indicate any other voting changes contained in the submitted

charter. Reason for adoption of those changes." (emphasis added).

On August 9, 1982, the City Manager made his response which included various documents and data requested by the Department. In reply to the request quoted above concerning "any other voting changes contained in the submitted charter," the City Manager offered his opinion that "no other changes affecting voting rights are proposed."

Prior to the election, the Justice Department advised the City that it could retroactively approve the Charter after the election and instructed the City Secretary to inform the public, through the local newspaper, of important provisions in the Charter. The Justice Department specifically instructed the City Secretary to include a discussion of Charter provisions concerning recall of council members. The Secretary complied with the request and published a lengthy article in the newspaper discussing specific Charter provisions including those dealing with recall.

On August 14, 1982 the proposed Home Rule Charter was approved by a majority of the legally qualified voters of Pleasanton.

On October 19, 1982 the Department wrote to the City that "your submission was completed on August 16, 1982." It also (1) expressly declined to interpose any objection to the Charter Commission election, the Charter adoption election, the adoption of bilingual election procedures and the method of electing the mayor, (2) objected to the election of councilmembers by numbered places instead of the previous "at-large" method, and (3) was silent as to all other provisions contained in the Charter.

Shortly after the voters' adoption of the Charter, the City remedied the Department's lone objection by passing an ordinance which deleted the Charter provisions providing for election of councilmembers by numbered places and restored the "at-large" method of electing councilmembers. That ordinance was forwarded to the Department and it

responded on December 20, 1982 that it interposed no objection to the ordinance.

The City continued to operate under the Charter without complaint or objection until August 1, 1983, when Plaintiffs filed their complaint requesting an injunction to halt an election to be held in Pleasanton to recall city councilman Travis Smith, one of the Plaintiffs. The principal ground asserted for issuance of an injunction was that the recall provisions in the Charter were not precleared and were void.

On August 11, 1983, the three-judge court denied the preliminary injunction and permitted the election to be held.[2] On August 13, 1983, Smith was recalled by the voters of Pleasanton.

The sole issue before the district court at trial was whether the recall provision of the Charter was submitted to the Attorney General for preclearance.

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[2]The order denying the injunction provided that Smith would remain in office until the case was finally adjudicated even if he were recalled.

Appellants argued that submission of the Charter constituted a submission of all voting procedures contained in the Charter. Appellants further argued that the Justice Department's decision to treat the Charter as submitted and to interpose no objection to the recall provision was not subject to judicial review.

The court ruled that in its submission of the Charter, the City of Pleasanton failed to submit the provision for recall of city officials in an unambiguous and recordable manner. In the majority opinion, Judge Shannon stated as the basis for his decision that: (1) the burden rested on the City to point out any voting changes, and (2) the court could not clearly ascertain from the face of the record - the submitted documents and correspondence - that the Justice Department's attention had been directed to the recall provision. Therefore, the recall provision was not properly submitted for preclearance. App. A, A-1-8, A-1-9.

The district court found that the City submitted the entire Charter: "On May 25, 1982 City Manager Don Savage sent a letter and two copies of the proposed Home Rule Charter to the Justice Department for preclearance." App. A, A-1-3. And Judge Shannon did not dispute that the Justice Department considered the entire Charter to be submitted and made its review on that basis.[3] Under Judge Shannon's test, however, only the voting provisions discussed specifically by the City in the transmittal letter accompanying the proposed Charter or that he could readily ascertain were considered and approved by the Justice Department were properly submitted for preclearance. Judge Shannon thus concluded that submission of the Home Rule Charter for preclearance did

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[3]In that regard, Judge Shannon stated: "The Justice Department responded with a letter dated July 26, 1982, which acknowledged receipt of the proposed Charter and determined that the City had not sent sufficient information to enable the Department to properly evaluate the proposed Charter." App. A, A-1-4. (emphasis added).

not constitute a submission of its recall provision - or any other voting provision not specifically referenced in the transmittal letter - under § 5 of the Voting Rights Act.[4]

Judge Reavley dissented. App. A, A-2-1. Judge Reavley found that the only issue before the court was whether the proposed Charter was submitted to the Department for preclearance of its voting procedures. He noted that both the city officials and the Justice Department thought they were reviewing the entire Charter. The Department had reviewed the method of electing councilmembers where the City had not specifically referenced this change in its transmittal letter. App. A, A-2-2.

Judge Reavley noted that Congress provided for Attorney General preclearance of laws affecting voting rights and

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[4]The court also held, sua sponte, that even if the recall provision was submitted, the Department's objection to the method of electing councilmembers by place implicitly included an objection to the recall provision. This holding will be discussed in part II of the following section.

procedures in order to eliminate the need for a declaratory judgment action. Concerns over delay had also caused Congress to place a fixed time limit on postponing implementation of legislation in order to provide some degree of finality and certainty to the review. To limit Justice Department review to only those procedures which a court might, after the fact, find were in its view sufficiently highlighted by local officials would defeat the Congressional goal of a more expeditious and less burdensome review. App. A, A-2-4.

Citing Morris v. Gressette, 432 U.S. 491 (1977), Judge Reavley concluded that since: (1) the Charter was formally submitted for preclearance review; and (2) the Attorney General was given an opportunity to object to the proposed election procedures within the statutory time limits, and did not, the recall provision could be validly implemented by the City. Judge Reavley emphasized, however, that Justice Department preclearance of a provision like the recall provision did not bar a subsequent

judicial action to challenge the law's constitutionality. App. A, A-2-5, A-2-6.

THE QUESTION IS SUBSTANTIAL

The district court opinion that the recall provision was not validly precleared squarely conflicts with the statutory scheme of 42 U.S.C. § 1973(c) and this Court's decision in Morris v. Gressette, 432 U.S. 491 (1977). For the reasons that follow, the Court is urged to reverse summarily the district court's opinion and render judgment that the recall provision was precleared under the Voting Rights Act.

I.

The critical legal issue to be resolved is whether submission of the proposed Charter submitted all voting provisions contained in the Charter or only the voting provision specifically referenced in the City's transmittal letter.

Generally, before a state or its subdivisions may implement any new legislation concerning voting practices or

procedures, it must submit the legislation to the Attorney General. 42 U.S.C. § 1973(c). If the Attorney General interposes no objection within sixty days of submission, the legislation is deemed to be approved or precleared and may be validly implemented. Id.

Thus, with respect to any legislation required to be approved, the only pertinent questions are whether it was submitted and whether the Attorney General interposed an objection within sixty days.[8] Under Morris, courts may not look beyond those issues in order to review the analysis or decision-making process of the Attorney General or even to determine if the Attorney General was negligent, mistaken or overlooked a crucial factor or provision. For instance, in Morris the Attorney General did not object to submitted legislation because he mistakenly believed that he should

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[8]The Attorney General may postpone the commencement of the 60-day period once if he believes he has inadequate information to evaluate the submission and requests additional information.

not do so while litigation was pending on the matter. His subsequent attempt to interpose an objection after the sixty-day period was ineffectual.[6]

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[6]In Woods v. Hamilton, 473 F. Supp. 641 (D.S.C. 1979), a case strikingly similar to the instant one, South Carolina submitted an act which had three components. The Attorney General responded by (1) expressly objecting to one component, (2) attempting to reserve the right to object as to another, and (3) failing to mention the third. In holding that the third component of the Act was precleared since the Attorney General failed to mention or interpose an objection, the Court stated:

> Whatsoever may have been the motive of the Attorney General in failing to object to the transfer of powers in his August 28, 1975 letter, the fact remains that the State submitted, the entire Home Rule Act and, under the law, the Attorney General of the United States was required to pass on all components of a completed submission at that time . . . .

Id. at 646. The Court also found that "whether by oversight or design, the Attorney General did not object to the [third component], and he [was] barred by his inaction." Id. at 647. The Woods court also relied on United States v.

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In the instant case, the court below looked behind the Justice Department's failure to object to the recall provision and inquired whether the Department ever considered and approved the recall provisions of the Charter. Under this Court's holding in Morris, that inquiry was error. The scope of inquiry is limited to whether a submission was made and the Attorney General's response thereto. In his dissent, Judge Reavley applied the letter test and found the recall provision precleared.

It is undisputed that the entire Charter was submitted for preclearance. However, citing Allen v. State Board of Education, 393 U.S. 544 (1969), Judge Shannon found that the City did not submit the recall provision in an unambiguous and recordable manner so that the Department could recognize and consider

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Georgia, C/A 76-1531A (N.D. Ga. 1977) aff'd, 436 U.S. 941 (1978), where the Attorney General "overlooked" a change which was held to have nevertheless been precleared since no objection was interposed. Woods v. Hamilton, supra, at 646-47. See also Dotson v. City of Indianola, 521 F. Supp. 934 (N.D. Miss. 1981).

the provision. Judge Shannon believed that the importance of the recall provision was not readily apparent on the face of the Charter. Therefore, Judge Shannon undertook to determine whether the Justice Department had focused its attention on and approved the recall provision. Because the City's transmittal letter referenced a different voting provision (the election of the mayor) and did not direct the Department specifically to the recall provision, he concluded that the City did not effectively submit the recall provision.

The City's submission of the Charter for preclearance of its voting procedures, including the recall provision, however, more than meets the minimum requirements set down in Allen for proper submission of voting legislation to the Attorney General.[7] Two copies of

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[7]In Allen, Mississippi officials failed to submit voting legislation for preclearance, but when the legislation was challenged before a three-judge court as not precleared they served copies of the trial briefs on the Attorney General. The state argued to this Court that service of the briefs

(continued)

the proposed Home Rule Charter were submitted to the Attorney General under the heading "Submission Under Section 5, Voting Rights Act, to the Assistant Attorney General, Civil Rights Division, United States Department of Justice." There is nothing ambiguous in the formal submission of the entire Charter and it was certainly submitted in recordable form. Moreoever, the submission was made in close consultation with the Justice Department, and the Department never notified the City that the submittal was improper. The majority's inquiry should have ended there. Allen does not limit submission to only those matters referenced or discussed in the transmittal letter enclosing the submitted legislation.

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constituted "submission" for the purposes of 42 U.S.C. § 1973(c). It contended that Attorney General awareness of the state voting enactment was sufficient. This Court rejected that argument, holding that the State must submit the proposed legislation in an unambiguous and recordable manner directly to the Attorney General with a request for consideration pursuant to the Act. Allen, 393 U.S. 544, at 571.

The majority also tried to reinforce its determination that the City only effectively submitted those matters referenced in its transmittal letter (and in the majority's view considered by the Justice Department) by reviewing the City Manager's response to the Department's request for additional information. In doing so, the majority again fell into the pitfalls the holding in Morris v. Gressette sought to avoid. As stated above, the Department requested substantial additional information from the City in the course of its review of the Charter. One of the requests asked whether "any other voting changes [were] contained in the submitted charter." (emphasis added). In the letter enclosing all of the information and documents requested, the City Manager offered his opinion that no other changes "affecting voting rights" were proposed. The majority found that while there was no bad motive on the City's part, the response distracted attention from the recall provision. App. A, A-1-10, A-1-11. Thus, the majority felt further

justified in its belief that the Justice Department only considered the provision referenced in the letter transmitting the City's new charter. However, to the contrary, the exchange itself demonstrates that the Justice Department thought it was reviewing the entire Charter. (See the emphasized portion of the Justice Department's inquiry quoted above.) If, after receiving the additional material, the Department believed that it still had insufficient information to review the entire Charter, it could easily have objected to the entire Charter or objected to all parts of the Charter that it did not expressly approve. Since the Department was silent on the recall provision and did not interpose an objection, the recall provision was precleared as a matter of law.

Further, in retrospect, it is certainly arguable that the recall provision might have a potential impact on voting rights. However, as Judge Reavley stated in his dissent, any argument concerning the question is superfluous. Under proper and well established

principles, the Attorney General's analysis of legislation under the Voting Rights Act and the basis for his decision is not to be reviewed in the courts. This Court foreclosed any such review in Morris. Thus, whether the City's opinion concerning the affect of Charter provisions on voting rights was correct and whether, and to what extent, the Attorney General may have relied on the opinion is irrelevant and is just the sort of speculative inquiry this Court set out to eliminate. Otherwise, this Court would be inundated with an avalanche of litigation challenging the kind and quality of information and opinions provided the Department and the extent of the Department's reliance on such information and opinions.

The majority's holding that only those portions of the Charter referenced in the City's cover letter received preclearance brings into question the validity of all other actions the City has taken under its new Charter. This would be a disastrous result for a small town that adopted a plan of self-government

and spent at least half a year working with the Justice Department on the preclearance of that plan. As Judge Reavley stated, unless local governments can assume some finality of review from preclearance, many election laws will be left open to uncertainty. This is precisely what Congress sought to avoid in providing that legislation may be implemented upon Justice's failure to object within the prescribed time limit.[8]

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[8]The recall provision was not the only new voting provision on which the Justice Department was silent; the Department did not expressly preclear or object to the provisions on Initiative and Referendum or Annexation. If a court is allowed to delve into the Attorney General decision-making process, as the majority did in this case, almost all precleared legislation would be cast into doubt and the statutory scheme destroyed. "Precleared" voting legislation could be challenged on the basis that the local officials submitted misleading or inaccurate information or failed to provide requested information that was available. Courts would then have to decide whether the Justice Department relied on the erroneous material or would have considered the unprovided document important, and to what extent it affected preclearance.

Even if it was proper for the majority below to inquire into the basis for the Department's failure to interpose an objection, the majority erred in concluding that the City did not adequately focus the Department's attention on the recall provision. The evidence introduced at trial conclusively proves that the Department reviewed the entire Charter. First, the Department understood that the entire proposed Charter was newly enacted legislation, Pleasanton's first self-government statute, and, as such, was a change from the existing law. Prior to submission, the Justice Department advised the City in numerous telephone conversations how to submit the Charter for preclearance. In telephone conversations after the Charter was submitted, the Department informed the City that the Charter would be reviewed for any discriminatory affect it might have on voting rights.

In determining that the City did not properly submit the recall provision of the Charter, Judge Shannon relied on

the fact that the City's submission cover letter directs the Justice Department's attention to the Charter provision dealing with the election of the mayor. But the uncontroverted evidence at trial was that the Department in telephone conversations had expressed concern over the method of electing the mayor and had instructed the City to make specific reference to it in the transmittal letter enclosing the submitted Charter. Moreover, as Judge Reavley noted in his dissent, the Department did in fact consider other provisions in the Charter not specifically referenced in the cover letter. The bilingual voting procedures, method of electing councilmembers, and the Charter adoption election were all expressly precleared in the Department response, although the cover letter only called attention to the method of electing the mayor. The fact that the Justice Department, in the course of its review, advised the City to publish information in the newspaper on the various new charter provisions, including specifically the recall provision, inescapably

demonstrates that the Department recognized and considered the recall provision.

II.

The majority below held alternatively that, even if the recall provision was submitted, the objection by the Attorney General to the method of electing councilmembers by place implicitly included an objection to the recall provision in the Charter. App. A, A-1-11. This issue was not raised by the parties before trial and was taken up by the Court on its own motion at the hearing. In any event, however, the majority's attempt to expand the Attorney General's objection was wrong as a matter of law.

First, there is absolutely nothing on the face of the objection interposed to the method of electing councilmembers that could be read as an objection to the recall provision. Second, Judge Shannon's reading of the Department's objection to include the recall provision flies in the face of its principal conclusion that the Department was not made aware of the

recall provision and, therefore, was given no opportunity to object. Third, it is illogical to read the objection to the method of electing councilmembers to somehow include the recall provision, as the recall provision also applied to all City officials, not just councilmembers. Finally, as noted above, uncontroverted evidence was introduced that the Department specifically instructed the City to publish a discussion of the recall provision in the local newspaper prior to the Charter election. It is therefore clear that the Department was aware of the recall provision and believed it was significant enough to require public discussion. If the Attorney General intended to object to the recall provision, he certainly had the information available to have done so explicitly. Further, the objection made by the Attorney General to the method of electing councilmembers was subsequently cured by the City with express Justice Department approval, and thus no objection of any nature whatsoever exists.

CONCLUSION

In Morris v. Gressette, this Court determined that the preclearance procedures were designed to be an expeditious method of obtaining preliminary review of legislative changes affecting voting rights. Thus, this Court held that the courts would not review the decision-making process of the Attorney General. Therefore, the only pertinent issues before the district court were whether the Charter was submitted and whether an objection was interposed. The entire charter was submitted for preclearance and no objection was made to the recall provision. For the reasons stated herein, the judgment below should be summarily reversed, and the case remanded to the district court with instructions to enter judgment that the recall provision of the Pleasanton Charter was properly submitted for Attorney General preclearance under the Voting Rights Act and, therefore, was validly enacted. Alternatively, the Court should note probable jurisdiction and set this case for briefing and oral argument.